Sin Lian Heng Construction Pte Ltd v Singapore Telecommunications Ltd [2007] SGHC 22

Case Number : Suit 525/2006, RA 292/2006

Decision Date : 15 February 2007

Tribunal/Court : High Court

Coram : Sundaresh Menon JC

Counsel Name(s) : S Magintharan, James Liew (Netto & Magin LLC) for the plaintiff; Dawn Tan, Julian Soong (Rajah & Tann) for the defendant

Parties : Sin Lian Heng Construction Pte Ltd — Singapore Telecommunications Ltd

Evidence – Admissibility of evidence – "Without prejudice" communications – Whether communications made by contractor in course of discussions with and in letter to employer made "without prejudice" and therefore inadmissible – Whether communications amounting to admissions – Whether communications made in context of negotiations to settle dispute between parties – Whether privilege applying to negotiations on quantum even where admission of liability existing

15 February 2007

Sundaresh Menon JC:

1 The 'without prejudice' privilege is well recognised by the courts and in legislation. Its object is to ensure that parties to disputes are not discouraged from making genuine attempts at peaceful resolution of their disputes for fear that their communications during negotiations may be used to their prejudice in subsequent proceedings. The policy has always been to encourage such parties to try to settle their disputes as far as possible without resorting to litigation. Free and uninhibited communications are seen as vital to this end and accordingly, communications made in the course of negotiations are privileged and as a general rule, cannot be referred to or relied upon in subsequent proceedings. This case presents an occasion for me to consider the proper ambit of the privilege and its application.

Background

2 The plaintiff, Sin Lian Heng Construction Pte Ltd ("the plaintiff"), is the contractor appointed by the defendant, Singapore Telecommunications Limited ("the defendant"), to undertake the laying and recovery of telecommunication cables, pursuant to various contracts entered into between the parties. The plaintiff contends that it duly completed all the contracted and additional works requested by the defendant but did not receive payment despite various requests, reminders and demands. The plaintiff accordingly commenced this action in August 2006.

3 The defendant, in response, brought a counterclaim seeking damages for breach of contract, conversion and/or detention in respect of copper cables that the plaintiff was to have recovered on the defendant's behalf pursuant to a contract dated July 2004 ("the agreement"), but which the plaintiff allegedly failed to deliver or to account for. The agreement was entered into on or about 29 July 2004.

4 In its counterclaim, the defendant pleaded various admissions that were allegedly made by the plaintiff's officers in the course of their dealings with the defendant's officers ("the admissions"). The admissions were made in the course of four site meetings ("the meetings") at which the issues of the

outstanding payments and the 'missing' copper cables were discussed among other matters, and in a letter from the plaintiff to the defendant dated 20 March 2006 ("the letter").

5 The plaintiff objected to the admissions being pleaded and applied to have them struck out. The plaintiff maintained that the admissions had been made "without prejudice". The plaintiff founded its application on O 18 rr 19(c) and (d) of the Rules of Court (Cap 322, R5, 2006 Rev Ed) and the inherent jurisdiction of the court.

6 It was common ground that neither party had specifically said prior to or at the meetings that the discussions were to be conducted on a "without prejudice" basis. Similarly, the letter in question did not contain any express qualification to this effect. However it was also common ground that the privilege could arise in the appropriate circumstances even in the absence of an express qualification. Thus, the arguments centred on the nature of the discussions at the meetings and on this, the learned Assistant Registrar who heard the application at first instance, found that the meetings had not been conducted in circumstances which warranted the conclusion that the discussions were privileged. It was noted that the meetings had involved discussions of a number of issues apart from the 'missing cables'. The learned Assistant Registrar was also of the opinion that there was no real dispute that the cables were missing. It also appears that the learned Assistant Registrar considered that the letter was bound up with the meetings and therefore the same conclusions applied to both the minutes of the meetings and the letter. Accordingly, the application was dismissed. Dissatisfied, the plaintiff appealed and this came before me.

7 After hearing arguments by both counsel, I allowed the appeal in part by varying the decision of the learned Assistant Registrar in relation to paragraph 19(e) of the Defence and Counterclaim. I ordered that paragraph to be struck out. In essence, I differed from the learned Assistant Registrar's conclusions in respect of the letter but not in respect of the meetings. Having regard to the fact that the matter was fully argued and that a number of issues of practical significance were raised, I thought it appropriate to set out the reasons for my decision and this I now do.

The Meetings

8 The focus of the arguments at the appeal was in relation to the letter. The submissions in relation to the minutes of the meetings were not vigorously pursued before me. Nonetheless, I briefly set out my reasons for dismissing this part of the appeal.

9 The starting point of the analysis is the principle that the 'without prejudice' privilege "governs the admissibility of evidence and is founded on the public policy of encouraging litigants to settle their differences rather than litigate them to a finish": *Rush & Tompkins Ltd v Greater London Council & another* [1989] AC 1280 ("*Rush & Tompkins*") at 1299. This rationale underlying the privilege was reaffirmed by the Singapore Court of Appeal in its recent decision in *Mariwu Industrial Co (S) Pte Ltd v Dextra Asia Co Ltd & another* [2006] 4 SLR 807 ("*Mariwu*") at [24] and [30], as well as by the House of Lords in *Bradford & Bingley Plc v Rashid* [2006] 4 All ER 705 ("*Bradford & Bingley*") at [4], [73] and [85].

10 It is trite law that the availability of the 'without prejudice' privilege is not dependent upon the use of the words "without prejudice": *Rush & Tompkins* ([9] *supra* at 1299); *Sinojaya Sdn Bhd v Metal Component Engineering Pte Ltd (Hoyo Crosstec Sdn Bhd, third party)* [2003] 1 SLR 281 at [31]. The failure to stipulate expressly that a communication is made "without prejudice" also does not preclude the operation of s 23 of the Evidence Act (Cap 97, 1997 Rev Ed) ("the Evidence Act") which is in the following terms:

Admissions in civil cases when relevant

23. In civil cases, no admission is relevant if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the court can infer that the parties agreed together that evidence of it should not be given.

11 The Court of Appeal in *Mariwu* ([9] *supra*) considered s 23 to be a statutory enactment of the common law rule and stated as follows at [24]:

> The words in s 23 contemplate two different situations that invoke the underlying rationales of the "without prejudice" rule. The first situation is where there is an express condition that any admission made by either party in the context of negotiations to settle a dispute is not to be "given", *ie,* admissible in evidence against the party making the admission. The situation applies to all communications made expressly "without prejudice" The second situation is where an admission is made "under circumstances from which the court can infer that the parties agreed together that evidence of it should not be given". This situation will cover cases where even though a statement is not expressly made "without prejudice" the law holds that it is made without prejudice because it was made in the course of negotiations to settle a dispute: see the judgment of Lord Hoffmann in *Bradford & Bingley plc v Rashid* [2006] 1 WLR 2066 at [13].

12 Thus, in cases where the communication is expressly stated to be made "without prejudice" then, subject to such exceptional situations as were identified by Robert Walker LJ in *Unilever plc v The Procter & Gamble Co* [2001] 1 All ER 783 ("*Unilever*") at 791 to 793, it will not be admissible. In cases where no express condition has been imposed as to the admissibility of any admission, it is a matter for the court to examine the surrounding circumstances in which the communication was made and then ascertain whether these were such that the court may infer an agreement to the effect that evidence of the communication should not be given. The classic instance of this would be where the parties were in fact seeking to settle a dispute at the material time.

13 For present purposes, there are two prerequisites before the privilege can be invoked. The first is that the communication must be an "admission". I return to this a little later in this judgment when I consider the position in relation to the letter. The second is that there must in fact be a dispute which the parties are trying to settle and it is this I begin with.

14 In the present case, the plaintiff argued that there clearly were existing disputes between the parties. In particular, the plaintiff pointed to the outstanding payments that were due to it for the works it had completed. The issue of the 'missing cables' had been brought to the plaintiff's attention by the defendant some time in December 2005. The plaintiff contended that these issues had led to the meetings in question. Therefore, it was submitted, the meetings were held in the context of the parties' attempts to resolve these outstanding disputes, and that it was clear that the parties were in the process of negotiating a compromise.

15 In response, the defendant argued that it was apparent from the facts and surrounding circumstances that there was no dispute between the parties that the copper cables were missing. The defendant submitted that the parties were not in fact negotiating a compromise at all but were discussing operational matters. It was further submitted that the plaintiff had admitted that it did not keep a proper record of the cables in its possession and had not returned all the cables it had recovered. Hence, the meetings could not have attracted the privilege because there was neither a dispute nor negotiations aimed at settling any dispute.

16 In my view, the inquiry begins with trying to establish what it was that the parties were seeking

to achieve at the meetings. In this regard, it was clear from the minutes of the meetings that the parties were openly discussing a number of operational matters, including the finalisation of accounts at the tail end of some projects. The discussions were in no way limited to the issue of the 'missing' copper cables (or even, for that matter, the outstanding payments allegedly due to the plaintiff). Mr Magintharan, who appeared for the plaintiff, candidly accepted that other site matters were discussed during the meetings. These were operational discussions where, among other things, the defendant was furnished with a status update on the progress of the various cable recovery works conducted by the plaintiff. As I suggested to counsel during the arguments, these meetings were directed at trying to answer the question – "where are the cables?" It was not the concern of these meetings to establish who was liable for any missing cables or how much would be offered or accepted for such cables as were found to be missing. In these circumstances, there is nothing to warrant the drawing of an inference that evidence of such discussions were to be excluded in any subsequent proceedings. On the contrary, what transpires at meetings of this sort are sometimes of direct relevance to the crystallisation of the dispute.

17 The meetings were simply not conducted in the context of an attempt to compromise a dispute, and the discussions at these meetings therefore could not be regarded as constituting "negotiations genuinely aimed at settlement" (per Lord Griffiths in *Rush & Tompkins* ([9] *supra*) at 1299) or "an attempt to compromise actual or impending litigation" (per Sir Robert Megarry V-C in *Chocoladefabriken Lindt & Sprungli AG v Nestlé Co Ltd* [1978] RPC 287 at 288). I therefore agreed with the decision of the learned Assistant Registrar on the issues raised in relation to paragraphs 19, 19(a) – (d) and Prayer 3 of the Defence and Counterclaim and dismissed the appeal to this extent.

The Letter

18 I turn to the letter. The plaintiff submitted that this was clothed with privilege on several grounds. The first was the simplest in some respects. It was submitted that there was an essential link between the meetings and the letter in the sense that the letter was sent pursuant to the meetings, and since these were conducted on a without prejudice basis, so too should the letter be treated as privileged. That argument failed since I held (as did the learned Assistant Registrar) that the discussions at the meetings were not privileged.

19 Mr Magintharan next submitted that the letter should be privileged because it was the opening shot in negotiations. He relied on *South Shropshire District Council v Amos* [1986] 1 WLR 1271 ("*South Shropshire*") and submitted that this attracted the privilege ("the first shot principle"). In response to this, Ms Dawn Tan, who appeared for the defendant, contended that the letter was not necessarily an opening shot. She submitted that there had previously been meetings at which the plaintiff had admitted liability for the missing cables. She submitted that the letter was no more than an attempt to seek agreement on an acceptable payment schedule.

20 After hearing the arguments, I decided in the plaintiff's favour on this issue. I subsequently acceded to a request by the defendant for me to hear further arguments. This was to allow counsel to address me more fully on *South Shropshire* and its applicability to the present facts. I also permitted further arguments on whether the plaintiff had admitted liability for the missing cables either by or before the letter.

21 In the course of the original and the further arguments the following issues were addressed:

(a) whether the "first shot" principle is sound and should be recognised in our law and if so whether it was applicable in this context;

(b) whether the letter contains an admission of liability as distinct from a mere admission; and

(c) whether the "without prejudice" privilege applies to negotiations on quantum even if there has been an admission of liability.

I turn to consider each of these.

Whether the "first shot" principle is applicable in the present case

22 In *South Shropshire*, the central question was whether a document sent by one party to the other was to be treated as a negotiating document, in which case it would be privileged. The English Court of Appeal re-examined two earlier decisions. These were in *In re Daintrey, ex parte Holt* [1893] 2 Q.B. 116 and *Norwich Union Life Insurance Society v Tony Waller Ltd* (1984) 270 E.G. 42 ("*Norwich Union*"). The former case re-iterated the fundamental principle that the 'without prejudice' rule "has no application unless some person is in dispute or negotiation with another" (at 119). The latter case applied this principle but Harman J developed it further. He said at 43:

> The rule has no application unless some person is in dispute or negotiation with another… The matter at that stage was, in my view, entirely an opening shot, and an opening shot in a situation where no war had been declared and no dispute had arisen. Indeed 'shot' may be an inapt word to apply to it. As it seems to me, this letter was not written in the course of negotiation, …As it seems to me, this letter, being the initiating letter, could not appropriately be so headed ['without prejudice']… [emphasis added]

23 In effect, Harman J held that letters which *initiated* negotiations before a dispute had in fact arisen could not be privileged as there was no dispute to compromise and nothing to negotiate. This was rejected by the English Court of Appeal in *South Shropshire* which concluded that Harman J had erred in saying that an initiating letter could not effectively or appropriately be headed "without prejudice". Parker LJ., delivering the judgment of the court, said at 1276:

> The judge [at first instance] in our view quite correctly concluded that in holding that an initiating letter could not effectively or appropriately be headed "without prejudice" Harman J erred in Norwich Union Life Insurance Society v Tony Waller Ltd. *If this were so no one could safely proceed directly to an offer to accept a sum in settlement of an as yet unquantified claim*. [emphasis added]

And later, at 1277, he said:

> [W]e conclude by stating that we agree with the judge…(c) that *privilege can attach* to a document headed "without prejudice" *even if it is an opening shot*. The rule is however not limited to documents which are offers. *It attaches to all documents which are marked "without prejudice" and form part of negotiations, whether or not they are themselves offers*… [emphasis added]

24 Parker LJ was not saying that the privilege can *only* attach where the document is headed "without prejudice", as later cases have made abundantly clear (see for example *Rush & Tompkins*). However, *South Shropshire* clearly sets out the rationale upon which the principle rests and why the approach taken by Harman J in *Norwich Union* cannot be correct.

25 The principle has been recognised and applied in many subsequent cases. In *Standrin v Yenton Minster Holmes Limited*, an unreported decision of the English Court of Appeal dated 28 June 1991,

Lloyd LJ, having referred to two earlier decisions of the Court of Appeal, namely *South Shropshire* and *Buckinghamshire County Council v Moran* [1989] 2 All ER 225 (which followed *South Shropshire*), said:

> The principle to be derived from these authorities, if it can be called principle, is that the opening shot in negotiations may well be subject to privilege where, for example, a person puts forward a claim and in the same breath offers to take something less in settlement, or, to take Parker LJ's example in *South Shropshire DC v Amos*, where a person offers to accept a sum in settlement of an as yet unquantified claim.

26 In *Schering Corporation v CIPLA Ltd and another* [2004] EWHC 2587 (Ch) (Transcript) ("*Schering*"), Laddie J said at [18]:

> It is also clear from these authorities that the opening shot in negotiations can, depending upon the circumstances, amount to bona fide without prejudice correspondence and be privileged accordingly.

27 Commonwealth authorities have also recognised this principle. In the Canadian decision of *Hansraj v Ao* (2002) A.C.W.S.J. 6409, Slatter J. said at [17]:

> Correspondence which contains an actual settlement offer is clearly privileged. So, too, would be correspondence that invites compromise, or outlines approaches that might be taken to settlement, or refers in some other indirect way to settlement, even if it did not contain an actual offer of settlement. In *Phillips v. Rogers* (1988) 92 A.R. 353, the Court was also prepared to find as privileged *some introductory correspondence from the adjuster*, *because it did in fact open eventual negotiations and led up to a detailed offer of settlement… The privilege is clearly an important one, and in cases of doubt as to whether the correspondence does relate to the negotiations, the Court should undoubtedly err on the side of protecting the privilege.* [emphasis added]

28 Although the court eventually found that the correspondence in question was merely routine – "the connection of this correspondence to any settlement negotiations [was] so marginal as to be virtually non-existent" (at [27]) – it was clear that the court also accepted and was prepared to apply the first shot principle at [27]:

> The fax of 22 April 1998 asking 'can we soon negotiate a settlement?' might well have been privileged as an 'opening shot' if any negotiations had resulted; on the present record there is nothing relevant in it even if it is admissible.

29 In *GPI Leisure Corp Ltd v Yuill & ors* (1997) NSW Lexis 1925, a decision of the Supreme Court of New South Wales,Young J also recognised the first shot principle.

30 I also note that commentators in the Commonwealth have recognised this principle. For instance, in Sopinka and Lederman, *The Law of Evidence in Canada* (Butterworths, 2nd ed., 1992), the authors state the "without prejudice" rule as follows:

> 14.215 A reasonable reconciliation of these apparently different approaches and cases is that the communication must be part of a correspondence which the parties intend will reasonably lead to a compromise or settlement of the dispute. Hence, *letters designed to open such negotiations,* or letters or discussions which attempt to convince the opponent of the strengths of the other's position, but which also recognize weaknesses, in the hope that some settlement can be effected once each other's positions are on the table, *should be subject to*

the privilege, whether or not they contain an actual offer of settlement. [emphasis added]

31 It is clear therefore that the first shot principle has been accepted as part of the common law across a number of jurisdictions. The question then is whether this principle is correct and should be recognised as part of the law here. In my view, the answer to both these questions is yes.

32 One needs to look no further for justification for the first shot principle than *South Shropshire* itself. In the passages I have quoted (at [23] above), it is simple logic that dictates. Negotiations must begin somewhere and if the public policy is to encourage parties to a dispute to reach a compromise or a settlement, then it must be the case that the initiating communication is itself protected from disclosure in the event that settlement is not reached. To hold otherwise would have a chilling effect on those contemplating the initiation of negotiations and that is flatly contrary to the policy I have referred to. In my view, the first shot principle is not a distinct principle from the "without prejudice" privilege. Rather, it is a particular but quite natural application of the latter and is based on the same public policy considerations. In those circumstances, I can see no basis at all for holding that the first shot principle does not or should not form a part of our law.

33 I turn then to consider whether the letter comes within the protection afforded by the principle. In considering this question, there are two closely related aspects to be addressed: first, was the letter in fact an "opening shot" or was it so inextricably linked with the meetings that preceded it as to necessarily be seen as a letter written to address and follow up on the operational concerns discussed there? Second, was the letter in fact written with a view to negotiate or attempt to negotiate or initiate negotiations towards a compromise of a dispute? There was no dispute that the privilege, if it arose, covered offers as well as discussions on offers or negotiations: *South Shropshire* at 1277.

34 As to the first aspect, Ms Tan submitted that the letter was not an "opening shot" in negotiations because it was written in the context and as part of the series of meetings held between the parties to determine the question "where are the cables?".

35 The minutes of the meetings in question do put the letter in context. It was clear that the letter was written after one of these meetings. However, it is evident from a perusal of the minutes of that meeting that the plaintiff had cause to be concerned about its commercial relationship with the defendant. The defendant's representative at that meeting had informed the plaintiff that the defendant might have to find alternative contractors to continue with the recovery works during this period given the lack of finality in the operational issues and the fact that further investigations needed to be carried out; and that in the interim, no outstanding payment would be released to the plaintiff. In that context, it appeared to me that the plaintiff was trying to propose a compromise in the letter in a serious attempt to avoid losing a client. There might well have been other commercial considerations.

36 To further illustrate the context in which the letter was written, reference may be made to the minutes of an earlier meeting held on 8 March 2006:

> 2.1 [The defendant] is withholding payment of about $500K to [the plaintiff]. [The plaintiff's representative] indicated that [the plaintiff] has about $1.2M worth of completed works for [the defendant] and [the plaintiff's representative] thus *requested whether the sum held back can be reduced to ease his cash flow difficulties. He needs capital to pay off wages and purchase of supplies for his various other projects with [the defendant]. A squeeze for too long a period would make it very difficult for him to turnaround (sic). He also proposed to [the defendant] to consider the value of security deposits guaranteed by various performance bonds in order to*

release some withheld payment. [emphasis added]

37 It may well have been the case that the letter was written in the context of and shortly after these meetings, and perhaps even as a result of the discussions held during the meetings. However, in my view, it would require a leap in logic to conclude that just because these meetings were "open", the letter *must* therefore also be treated as such. In each case, it depends on the terms and the contents of the communication as to whether it is to be seen as an opening shot and whether a detailed discussion on operational matters has given way to an effort to resolve the differences on a commercial basis. This depends on the *substance* of the communication rather than purely its *timing*.

38 I turn to the contents of the letter. Ms Tan submitted that it was clear from the letter that the plaintiff had acknowledged a number of things which led irresistibly to the conclusion that the plaintiff had also admitted liability for the missing cables. Thus, she submitted, there could have been no negotiations to compromise a dispute because there was ultimately no dispute left (assuming there was one to begin with).

39 I propose to say a little more on the question of whether the letter contained an admission of liability further below. Having regard to the fact that I found that the letter was privileged, I do not propose to set out its contents. However, for present purposes, it suffices for me to say that I did not find that there was an admission of liability contained in the letter. For all intents and purposes, the letter was the first communication between the parties after a series of four meetings. In substance, it was markedly different in nature from the sort of exchanges that had taken place at the meetings. In my judgment, the letter was in fact intended to shift the discussion to a new phase directed at finding a commercial solution to the impasse. Therefore, in my judgment, the letter clearly fell within the protection afforded by the first shot principle.

Whether the letter contains an admission of liability as distinct from a mere admission

40 I return to the argument I have referred to at [38] above. A string of cases have recognised that "the without prejudice rule has no application to apparently open communications … designed only to discuss the repayment of an admitted liability rather than to negotiate and compromise a disputed liability" (see *Bradford v Bingley* [9] *supra* at [73]). In short, the privilege cannot be invoked where no dispute in fact exists: *Mariwu* ([9] *supra* at [30]); *Re Sunshine Securities (Pte) Ltd* [1975-1977] SLR 282. The reason for this is quite simple. There is no legitimate policy interest to protect appeals for leniency or mercy. Ms Tan attempted to develop from the foregoing an argument for disclosure. She submitted that where the plaintiff contends that the letter is cloaked with the "without prejudice" privilege it must follow that there had to be an admission. This is the case both at common law, and under s 23 of the Evidence Act which only applies to admissions. This much I accept: see [13] above. She then submitted that if I found that the letter was privileged, it must follow that I was satisfied that it contained an admission of liability; and on that basis there would be no dispute in existence and therefore there was nothing that the privilege could attach itself to.

41 In my judgment, this was incorrect and entailed some circular reasoning. Crucially, as I pointed out in the course of arguments, it overlooked the distinction between an admission generally and an admission of liability such that there was no longer a dispute between the parties. If Ms Tan was correct, it would mean that there would never be an occasion to apply the "without prejudice" privilege because if an admission were equated with an admission of liability, there would be no legitimate dispute to be settled. The simple way out of this apparent conundrum, (and it is a point which was later conceded by Ms Tan) is to recognise the distinction between an admission of liability and a mere admission.

42 What then is the difference? I begin by quoting a passage from the decision of the English Court of Appeal in *Unilever* (at [12] above), where Robert Walker L.J. after reviewing the principles enunciated in the modern cases on the 'without prejudice' rule, said at 796, "[The cases] show that the protection of *admissions against interest* is the most important practical effect of the rule" (emphasis added).

43 Admissions are statements which suggest any inference as to any fact in issue or relevant fact: s 17(1) of the Evidence Act. In *Mariwu* ([9] *supra*), the Court of Appeal noted at [31] that "the principle against the admissibility of admissions made in the course of negotiations to settle a dispute is based on admissions against interest". A statement or action that appears on its face to go against the interest of the maker might be seized upon by the opposite party as an admission. This may take the form of statements which are prejudicial in any number of ways. Where one party enters into negotiations with another to explore the possibilities of settlement, it makes sense of course to attempt to convince the opponent of the weaknesses of his position; but it is not unusual – even common – to seem to acknowledge possible weaknesses in one's own case. Even the level of an offer may be seen as a barometer of the offering party's enthusiasm for the merits of his own position and while that may be quite irrelevant if the communication was cloaked by the privilege, one can see that most litigants would avoid any attempt at settlement if there was a risk that their offers to settle were later going to be raised against them as a sign of weakness. It is thus in the overall spirit of encouraging negotiations that parties be sufficiently protected when they "lay their cards on the table". As Breitkreuz, Master in Chambers said in *College of Physicians & Surgeons (Alberta) v Cooper* (1994) 152 AR 204 at [22]: "I think the authorities support the view that a lay person who puts all his cards on the table…should not be faced with a reply in effect which says 'no deal, but thanks for showing me your hand'."

44 A starkly different situation arises when one considers an admission of liability. Here, one is concerned with the situation where the debtor clearly acknowledges his liability. As I have noted above at [40], there is no legitimate interest to protect in such cases when the debtor throws his hands up and pleads for mercy. There is no reason why the creditor should not be allowed to rely on that fact if he wished to or needed to. It is this kind of situation that was encountered in cases such as:

(a) *Ted Bates (M) Sdn Bhd v Balbir Singh Jholl* [1979] 2 MLJ 257 ("*Ted Bates*"), where one party wrote a letter admitting that he owed $250,000 to the other but merely asked for time to repay the sum;

(b) *Re Sunshine Securities (Pte) Ltd* ([40] *supra*), where the respondent wrote two letters to the appellant, the earlier letter being a request for time to make payment and the latter being a 'without prejudice' letter requesting particulars of a demand, both letters being held not to be privileged as there was no dispute as to the debt owed; and

(c) *Bradford & Bingley* ([9] *supra*), where two letters which again did not dispute the liability in question were held not to be 'without prejudice' letters. As Lord Brown of Eaton-Under-Heywood said at [73], "the without prejudice rule has no application to apparently open communications, such as those here, designed only to discuss the repayment of an admitted liability rather than to negotiate and compromise a dispute liability". Lord Walker of Gestingthorpe was of the view (at [39]) that "there was no dispute as to liability to be compromised, the *only element of negotiation being directed to obtaining time for payment* (any reduction in the amount to be paid, as suggested in the agent's second letter, would have been a matter of *pure indulgence* on the part of the lender)" (emphasis added).

45 One commentator has described the expression "without prejudice" as the "flag of truce under which negotiations may be safely carried on… but there is a limit to the protection that it gives, and it is well that this limit should be clearly defined and understood: for, in the interests alike of self-preservation and of honourable warfare, it is of pre-eminent importance that both sides should know exactly when and where the 'flag of truce' is or is not flying" (1984) 97 LTJ 265 (which is quoted by Slatter J in *Hansraj v Ao* [27] *supra* at [13]). That paints the background suitably well. In my judgment, and expanding on this analogy, once there has been an admission of *liability*, the "flag of truce" gives way to the "white flag of surrender". There can be no protection whatsoever in the latter setting for there is nothing left to protect.

46 In Ms Tan's further arguments, she then sought to persuade me that the letter constituted a "clear and unequivocal admission" of liability. She submitted that this was clear from the substance as well as the context of the letter. For the same reasons that I have mentioned at [39] above, it is not appropriate that I set out its terms in full.

47 However, I was satisfied that seen in the proper context, it did not contain an admission of liability. Rather, it was written to initiate negotiations on reaching a commercial solution acceptable to both parties.

Whether the "without prejudice" privilege applies to negotiations on quantum even if there has been an admission of liability

48 I next address one further aspect that was raised in the submissions. Even if I were mistaken in finding that the letter did not contain or constitute an admission of liability, could the "without prejudice" privilege nevertheless apply if the letter initiated negotiations on the quantum payable on the defendant's claim? This relates to a point of distinction between the present case and other cases such as *Bradford & Bingley* or *Ted Bates* ([44] *supra*) which involved straightforward debt claims. Where one is dealing with a straightforward debt claim, an admission of liability for the debt would leave nothing to be litigated. That is quite different from a case such as the present where, even assuming there was an admission as to liability for the missing cables, there could well remain a substantial dispute over the amounts payable. In my judgment, the privilege would apply to negotiations on quantum in such circumstances. My attention was not drawn to any direct authority on this point but the proposition in my view is certainly justified on policy grounds as well as in principle.

49 It was not disputed that the letter at the very least involved negotiations over the amount that might be paid and this was not as a matter of pure indulgence. The policy reasons behind the "without prejudice" privilege have been shortly stated in the cases referred to above at [9]. In a nutshell, the underlying policy justification for the rule is that "parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations…may be used to their prejudice in the course of the proceedings" (*Cutts v Head* [1984] Ch 290 at 306 *per* Oliver LJ, quoted with approval by the House of Lords in *Rush & Tompkins* ([9] *supra*) at 1299).

50 In my view, this rationale applies with equal force to negotiations on quantum where there is a real dispute over this. In such situations, even though one party may have admitted to liability, as long as there remains a dispute as to the extent of that liability, the policy interests are implicated. The privilege is thus equally well justified since it is just as important to the avoidance of the litigation of such matters. It is plain that if parties cannot agree on the specific settlement *amount*, they will continue to litigate that issue.

51 In my judgment, the same result can also be seen to be justified *in principle*. In *Unilever* ([12] *supra*), Robert Walker LJ stated that it would be undesirable to "dissect out identifiable admissions and withhold protection from the rest of without prejudice communications". The rationale for this proposition is that if there was a risk that some part of the communications, that take place in circumstances where the parties are trying to come to a settlement, may later be found not to be privileged, it would inhibit the discussions as a practical matter. In my judgment, the same sort of practical difficulties would arise if the "without prejudice" rule were held not to apply to negotiations directed at settling disputes on quantum.

52 One can quite easily imagine a situation where negotiations both as to liability and quantum are conducted on the same plane and at the same time. If the negotiations in respect of liability succeed, but those as to quantum break down and the matter proceeds to trial for an assessment of damages, it would be patently unfair for evidence of such negotiations to be admitted. As observed by Robert Walker LJ in *Unilever* at 796, "[p]arties cannot speak freely at a without prejudice meeting if they must constantly monitor every sentence, with lawyers or patent agents sitting at their shoulders as minders".

53 In addition, I note that there are some observations in the judgments of the House of Lords in *Bradford & Bingley* ([9] *supra*), which also seem to me to lend support for this view. The House of Lords in *Bradford & Bingley* had to consider whether a letter containing an acknowledgment of a debt for the purposes of s 29(5) of the UK Limitation Act 1980 was inadmissible if it attracted the "without prejudice" privilege. If it did fall within s 29(5), time would start to run afresh for the purposes of that Act. The House of Lords had to balance two potentially competing considerations arising out of the public interest in encouraging the settlement of disputes so as to avoid litigation: the desirability of enabling uninhibited communications while attempting to settle a dispute on the one hand, and the desirability of allowing a creditor who is induced by his debtor's acknowledgement of the debt to postpone the institution of proceedings to have the benefit of the applicable period of limitation commencing at a later time than would otherwise have been the case. That context somewhat differentiates the case from the present but not materially for the purposes for which I refer to it. On the key issue before the House of Lords in *Bradford & Bingley ie* how to sensibly strike a balance between the competing considerations I have referred to, there was a variety of positions taken by Law Lords each of whom delivered their own reasons for the common conclusion they all reached. The resolution of this issue to some extent depends upon where the boundaries of the "without prejudice" privilege are drawn. To the extent the House of Lords in *Bradford & Bingley* did demarcate these boundaries, it is relevant to the issue before me. To the extent the Law Lords considered whether or to what extent the "without prejudice" privilege might have to give way to the interest of rendering acknowledgements of liability admissible so as to postpone the commencement of the relevant period of limitation, it is not relevant to the issue before me and I express no view upon it.

54 In this light, I refer to the observations of Lord Hope at [34]:

> There is … a public interest in prolonging the limitation period in the case of an acknowledged claim, as this tends to keep claims that are still capable of settlement out of court. So there is a balance to be struck between the public interest in that respect and the public interest in preventing statements made in the course of negotiations being used at the trial as admissions of liability. *It would be bizarre if a claimant who had been dissuaded from taking proceedings time and time again both before and after the expiry of the limitation period by prolonged correspondence which contained repeated statements that liability was admitted, and which sought to negotiate only on the matter of quantum, was to be deprived of his claim on limitation grounds when negotiations broke down simply because the admissions were made in letters which contained proposals as to the amount that was to be paid in settlement of that liability.*

This suggests to me that there is something wrong with an absolute rule that will always exclude an admission made in the course of negotiations from being relied upon as an acknowledgement for the purposes for the purposes of the 1980 Act. [emphasis added]

55 If one sees the context in which that observation was made, it becomes apparent that Lord Hope at least implicitly accepted that negotiations on quantum where there was a genuine dispute would ordinarily attract the "without prejudice" privilege and so be inadmissible.

56 Similarly, Lord Brown (with whom Lord Walker concurred) based his decision on the fact that the letters in question in the case were not properly to be regarded as attempting to compromise a real dispute. He noted as follows at [72], [73], [75] and [76]:

72 … If the without prejudice rule is to apply not merely to attempts to resolve a dispute over the existence or extent of a liability but also to discussions as to how an admitted liability is to be paid, that would seem to me a very substantial enlargement of its scope …

73 In my opinion the without prejudice rule has no application to apparently open communications, such as those here, designed only to discuss the repayment of an admitted liability rather than to negotiate and compromise a disputed liability. I find it impossible to regard the correspondence here as constituting "negotiations genuinely aimed at settlement" … No "statements or offers" were made here with a view to settling a dispute. Since the debt was admitted, there was no dispute. As Mr Fenwick aptly put it in argument, Mr Rashid was simply asking for a concession; he was not giving one.

75 *As I have explained, acknowledgements may well leave issues of quantum outstanding and negotiations designed to resolve these to my mind should qualify for without prejudice protection. …*

76 *In short, therefore, some acknowledgements will indeed attract without privilege protection. But these will be cases where the extent of the liability is genuinely in dispute and the parties are attempting to settle that difference. …* [emphasis added]

57 Lord Mance (at [83]) also was of the view that the appeal could be disposed of on the basis that the "without prejudice" privilege simply did not apply because the correspondence in question was not directed at settling a real dispute. In essence, the majority of the judgments of the House of Lords in *Bradford & Bingley* appear to have accepted that negotiations to settle genuine disputes over quantum of liability would ordinarily attract the "without prejudice" privilege.

58 In my judgment, this accords as well with the distinction between admissions that leave nothing to be compromised and hence do not attract the privilege, and those that may well be against the interest of the maker but which fall short of an outright acceptance of the liability claimed and which would be privileged. I reiterate in this context what I have said at [43] above. I am satisfied therefore that the "without prejudice" privilege applies just as much to negotiations to settle disputes on quantum as it does to negotiations covering a wider remit. Whether such protection trumps or is trumped by the interest underlying the admissibility of acknowledgements for the purposes of extending the period of limitation is a matter for another occasion for the reasons I have explained above. In the present case, even assuming there had been an admission of liability (which in my judgment there was not) the letter would still be protected by virtue of its being a first shot at attempting to compromise disputes as to quantum.

Other issues

59 What I have said above is sufficient to explain my reasons for allowing the appeal in part. However, there were a few other arguments raised which were not pursued with great vigour. Nevertheless, for the sake of completeness, I now address these briefly.

60 First, the defendant submitted that looking at the circumstances as a whole, I should find that the plaintiff, in writing the letter, in fact had no intention to negotiate. This was especially so because the document was not marked 'without prejudice', and it had been written after the meetings which I found to be 'open'. Ms Tan therefore urged that the inquiry had to begin with the defendant's contention that the letter should be regarded as an 'open' correspondence. In my opinion, that goes too far. I agree that the presence of the relevant words would place the burden of persuasion on the party who contended that the relevant words should be ignored. But in the absence of such words, I consider that the court should approach the inquiry with no predilection one way or the other and examine all the circumstances to determine whether the privilege arises.

61 Second, Ms Tan submitted that even if the letter was made "without prejudice", the plaintiff had waived any privilege which may have attached to it by expressly referring to the letter and its contents in its solicitors' reply to the defendant's letter of demand for the return of cables. In my judgment, I do not think the privilege was waived by Mr Magintharan's letter. Waiver in this context would be an implied one and this would contemplate conduct that unequivocally pointed to an intention not to rely on the privilege. In my opinion, the facts in *A-B Chew Investments Pte Ltd v Lim Tjoen Kong* [1989] SLR 790 illustrate the point nicely. In that case, an affidavit had been filed by the defendant which referred to certain negotiations. The plaintiffs filed an affidavit disputing the defendant's version of the negotiations. The defendant then filed two affidavits which countered the plaintiffs' affidavit. In so doing, the defendant, instead of objecting to the plaintiffs' affidavit and making an application to strike it out, made further reference to these negotiations and descended into the details of what had actually transpired. This was a clear instance of a waiver of privilege by conduct. In the present case, I do not think that the single reference to the letter in the context of correspondence *between the parties themselves* can amount to a waiver of privilege. I therefore did not accept Ms Tan's submissions on this point.

Conclusion

62 At the heart of this appeal was the issue of whether the plaintiff could properly invoke the protection afforded by the "without prejudice" privilege. In my judgment, it was entitled to do so in respect of the letter but not in respect of the minutes of the meetings. I therefore allowed the appeal in part by varying the decision of the learned Assistant Registrar in relation to paragraph 19(e) of the Defence and Counterclaim, and ordered that paragraph to be struck out. As I indicated to both parties at the hearing of the appeal, I ordered that costs be in the cause.

63 Finally, I would like to thank both counsel for their assistance in this appeal. Ms Tan in particular exerted considerable efforts on her client's behalf and although I was ultimately not persuaded I was most grateful for the assistance I received in the arguments.